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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 995

CLAUDE BOWERS, ET AL.,

Petitioners,

vs.

REMINGTON RAND, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, Claude Bowers and 54 others, who were plaintiffs and intervening plaintiffs, pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals in the above-entitled cause.

Opinions Below

The opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 113) is reported in 6 Wage Hour Cases 496. The remarks of the District Court (R. 74) are reported in 64 F. Supp. 621.

Jurisdiction

The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered on December 10, 1946 (R. 117). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

Whether the hours which petitioners, firemen, though permitted to sleep, were required as part of the employer's fire protection system to spend on the employer's premises, were part of the workweek within the meaning of the Fair Labor Standards Act.

Statute Involved

The relevant provisions of the Fair Labor Standards Act of 1938 are set forth in the Appendix.

Statement

The petitioners were plaintiffs and intervening plaintiffs in this suit under the Fair Labor Standards Act to recover unpaid overtime compensation, liquidated damages and attorney's fees, with respect to their employment on and after February 7, 1944.

Petitioners were employed as firemen in the fire department maintained by respondent in its operation of the Sangamon Ordnance Plant, where it was engaged in loading and assembling ammunition for the Army. The plant required continuous 24-hour fire protection. Until February 7, 1944, the fire department was operated on a three-shift basis, each shift working 8 hours. In 1943, respondent gave consideration to the adoption of a two-platoon system. A notice to employees containing that proposal (Defendant's

Exhibit 1, R. 70) was submitted to the firemen, for signature in the event of approval (R. 82-83).

The two-platoon system, with two shifts of 24 hours each, was begun on February 7, 1944. From 8:30 a. m. to 4:30 p. m. the men carried on routine duties, e. g. cleaning the equipment and the stations, inspections, drilling and practice runs. During the 4:30 p. m. to 12:30 a. m. period there were occasional practice runs and some special assignments to keep grass fires under observation. During this period the men were permitted recreational activities. From 12:30 a. m. to 8:30 a. m. the men went to bed, except for their duties in the morning and a man on the telephone watch (R. 84).

The men were paid at the rate of 76 cents per hour, with time and a half for all hours over 40 during the week. They were not paid for time between 12:30 a. m. to 8:30 a. m. unless they were out on emergency calls. There were very few emergency calls (R. 86). The number of personnel employed in the fire department was reduced one-third by the introduction of the two-platoon system and the saving in wages paid was approximately one-third as the result of the reduction in personnel (R. 52).

In the installation of the two-platoon system it was necessary for respondent to obtain the approval of two-thirds of the firemen, according to instructions of the Ordnance Department. Out of 122 firemen, 95 signed documents like Defendant's Exhibit 1 (R. 58). The documents were gathered up the same night they were distributed (R. 44). All but three of the petitioners employed before February 7, 1944, signed such documents. Fifteen who were employed after the plan was adopted did not sign the same (R. 51).

There was testimony that when the document was under consideration the Fire Captain told the men they would not

last long if they did not sign it (R. 50).* Of the 27 firemen who did not sign the document, 3 were kept on at their request and the employment of the other 24 was terminated in the fire department (R. 58). The District Court sustained an objection by respondent when petitioners offered to prove by a fire chief that Mr. Mahoney, the Director of Protection, "stated that the two-platoon system was going to be instituted and it had to be put over, and that any of the men who refused to sign an instrument such as defendant's Exhibit No. 1 would be fired" (R. 69).

There was testimony that the men, in discussing the two-platoon system, did not have in mind working 8 hours out of 24 without pay (R. 49). Shortly after the two-platoon system was instituted the men talked to the Captain about their claim for overtime (R. 41). This suit was filed July 14, 1944 (R. 5).

The plant required continuous fire protection 24 hours a day (R. 82). The men were required to stay on the premises during the 12:30 a. m. to 8:30 a. m. period. The District Court found that those in charge of the fire department were liberal in excusing absences at any time, until May 18, 1945, when a bulletin informed the firemen that absenteeism on the third shift would be permitted only in the emergency of sickness or death (R. 87). That was issued because too many men were asking to be excused at 12:30 a. m. and those in charge could not permit such an impairment in the efficiency of the fire department (R. 65).

There was conflicting evidence on whether living conditions were generally satisfactory (R. 51, 66-67), and the District Court found they were suitable (R. 86).

A telephone watch was maintained throughout the 24 hours. The nature and rotation of this watch was ar-

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* The reference, at R. 50, to Defendant's Exhibit V should read Defendant's Exhibit 1.

ranged at each station by the captain. Prior to October 2, 1944, the station captain was not required to assign a specific 8-hour rest period for the man who stood this watch (R. 85-86). This suit was filed July 14, 1944 (R. 5). In September 1944, the plant officials became aware that the telephone watch system was not in accordance with the two-platoon plan which had been set forth by respondent, and the change was made (R. 57). The District Court found that it does not appear that any petitioner who stood this watch on any day in the 12:30 to 8:30 a. m. shift failed to take or was prevented from taking a consecutive 8-hour period for sleeping some time prior to 12:30 a. m. (R. 86). There was testimony by petitioners that they took the telephone watch in that period before provision had been made for an 8-hour rest period, and did not have such a rest period (R. 36, 40, 44; see also R. 46).

There was evidence that in the morning, under the two-platoon system, the station was cleaned, if it needed cleaning, beds were made up and put away, about half the men had breakfast, and the equipment was taken off the trucks. There was testimony that these activities required from one-half to three-quarters of an hour (R. 35), and other testimony that putting away the bed linen and clothing took only five minutes (R. 66). Under the three-shift system, the men on the 12:30 a. m. to 8:30 a. m. shift cleaned the station and equipment, put the equipment on the trucks, some men went out on inspection and after that the men played cards and some slept. All the work was done by 2 a. m. (R. 35).

The District Court entered judgment for respondent. It found that the contract of employment consisted of defendant's Exhibit 1, which set forth the general terms of the contract, that in practice there were no variations in substance from this contract, and that respondent did not

cause or permit any of petitioners to be deprived of the 8-hour sleeping period without paying compensation or according other suitable periods for rest and sleeping (R. 87). In its conclusions of law, the court stated that where an employee receives a normal period of consecutive hours for sleep, those hours are not hours worked, and a contract to leave such hours uncompensated is valid (R. 89-90).

The Circuit Court of Appeals affirmed on the ground that petitioners had contracted to wait to be engaged (R. 113).

Specification of Errors To Be Urged

The Circuit Court of Appeals erred:

1. In failing to reverse the District Court for not considering and taking due account of the factors showing that the hours were spent on the premises of the employer pursuant to the employer's requirement and predominantly for the benefit to the employer, including protection against fire due to the presence of qualified firemen on the scene;

2. In treating the written consent of some petitioners to the two-platoon plan proposed by respondent, and the silence of others, as the equivalent of a contract of employment to settle doubtful issues as to the scope of the workweek;

3. In failing to take account of the evidence as to the circumstances in which the employees consented to the two-platoon plan, including the evidence that respondent's officials informed the employees that they would not last long if they did not consent to the plan;

4. In failing to reverse the District Court's exclusion of evidence that an official of the respondent stated that employees would be fired if they did not consent to the two-platoon plan;

5. In giving undue effect and significance to a contract of employment to settle activity to be included in the work-week, assuming one to exist.

6. In affirming the judgment of the District Court.

Reasons For Granting the Writ

This petition raises substantially the same questions as the petition in No. 993, *Bell* v. *Porter*, and should be granted for the reasons stated in points 1, 2, 4 and 5 of that petition.

The District Court concluded as a matter of law that hours on the employer's premises constituting a normal period of sleep are not working time. It erred in failing to consider all the factors outlined in the *Bell* petition, point 1, showing that those hours, in circumstances like these, are spent on the employer's premises predominantly for the benefit of the employer. Under respondent's two-platoon system when the firemen asked to be excused during the night hours, respondent issued instructions limiting such permitted absences to emergencies of sickness or death, in the interest of maintaining the efficiency of the protection of its fire department (R. 65, 87), which was necessary 24 hours a day (R. 82).

The District Court's judgment was predicated in part on the contract of employment, and the Circuit Court of Appeals rested solely on that agreement. This ruling should be reviewed and reversed for the reasons stated in point 4 of the Bell petition. The situation in this case cannot be given even the dignity or effect of a contract to settle doubtful issues as to the activity or non-activity to be included in work. Defendant's Exhibit 1 was not subject to discussion but was presented on the flat basis that the hours from 12:30 a. m. to 8:30 a. m. would be uncompensated. It was not an offer which bound the respondent

upon acceptance. Not all the petitioners signed it (R. 51). The documents were distributed to the employees for signatures of consent and approval and were collected the same day without copies left behind (R. 44). More significant is the employer pressure which vitiates the significance of the consents. The courts below did not even refer to the testimony that the documents were distributed with statements that the men would not last long if they did not sign it (R. 50). The District Court excluded the testimony that respondent's director of protection stated that the two-platoon system was going to be instituted and it had to be put over, and that any of the men who refused to sign the document, Defendant's Exhibit 1, would be fired (R. 69).

Conclusion

For the reasons stated in this petition, including the incorporation by reference of the reasons stated in the petition in No. 993, *Bell* v. *Porter*, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February, 1947.

APPENDIX

Statutory Provisions Involved

The pertinent provisions of the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201) read as follows:

Sec. 3. As used in this Act——

* * * * * * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

* * * * * * *

(g) "Employ" includes to suffer or permit to work.

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Sec. 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce——

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section.

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one-half times the regular rate at which he is employed.